Nos. 85-93 and 85-428

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

P. E. BAZEMORE, *et al.*,
Petitioners,

v.

WILLIAM C. FRIDAY, *et al.*,
Respondents.

UNITED STATES OF AMERICA, *et al.*,
Petitioners,

v.

WILLIAM C. FRIDAY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL

The Equal Employment Advisory Council (EEAC) respectfully submits this brief amicus curiae. The

parties' written consents to file this brief have been filed with the Clerk of this Court.

INTEREST OF THE AMICUS CURIAE

The Equal Employment Advisory Council (EEAC) is a voluntary nonprofit association organized to promote the common interest of employers and the general public in sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade and industry associations. Its governing body is a Board of Directors composed primarily of experts and specialists in the field of equal employment opportunity, whose combined experience gives EEAC a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are committed firmly to the principles of nondiscrimination and equal employment opportunity.

Substantially all of EEAC's members, or their constituents, are employers subject to various equal employment laws, including Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.* EEAC's members maintain wage and salary schedules that comply with Title VII's non-discrimination requirements. Thus, EEAC has a direct interest in one of the issues presented for the Court's consideration in the instant case—whether a district court properly may dismiss allegations of a pattern or practice of disparate treatment which are based on multiple regression analyses that fail to account for relevant variables that are likely to affect salary deter-

minations. EEAC takes no position regarding whether the plaintiffs in the instant case established a timely claim under Title VII for current wage disparities that result from pre-Act discrimination, but rather limits its discussion herein to the issue of the appropriate burdens of proof in cases involving the use of multiple regression analyses.

Because of its interest in the issues of statistical proof of discrimination under Title VII, and the relative burdens required of plaintiffs and defendants thereunder, EEAC has filed amicus curiae briefs with this Court in numerous cases involving the interpretation of that Act, including *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977); *Furnco Construction Co. v. Waters*, 438 U.S. 567 (1978); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); and *Connecticut v. Teal*, 457 U.S. 440 (1982).

STATEMENT OF THE CASE

Bazemore and more than fifty other employees ("Bazemore" or "plaintiffs") sued officials of the North Carolina Agricultural Extension Service ("NCAES" or "defendants"), alleging a pattern or practice of intentional race discrimination. Before 1965, NCAES agents, who provide agricultural and other educational services to state residents, were divided racially into separate branches. Prior to 1965, NCAES had paid black agents serving black constituents a lower salary than white agents in a similar capacity.

NCAES eliminated these separate branches in 1965, shortly after the effective date of Title VII, by merging the two branches into a single organization.

NCAES attempted to eliminate pre-Act salary disparities by, for example, setting uniform minimum starting salaries for all agents. Wage disparities, however, had not been entirely eliminated when this suit was filed in 1971, or in 1972 when Title VII was amended to require compliance by state agencies.

At trial, the Justice Department, as intervenor, introduced multiple regression analyses comparing the salaries of black and white agents for the years 1974, 1975 and 1981. These regression analyses, which controlled for four variables allegedly determinative of salary (race, education, tenure and job title), suggested statistically significant racial effects in 1974 and 1975, but not 1981. These regressions did not control for across-the-board and percentage pay increases. NCAES introduced regressions which also added quartile rank, a measure of job performance, yielding statistically significant disparities in 1975, but not 1981.

The district court ruled in favor of NCAES on all counts. First, the court ruled that a pre-Act difference in salaries need not be affirmatively eliminated. In addition, the district court rejected the Justice Department's regression analyses as flawed because the regressions failed to account for a number of relevant variables, including across-the-board and percentage pay increases. The court concluded that while the plaintiffs had "probably made out a prima facie case with respect to defendants' promotion and salary practices," the defendant "articulat[ed] plausible reasons for its actions . . . which the court found convincing." Pet. App. 190a.[1]

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[1] "Pet. App." refers to the appendix filed with the petition in No. 85-93. "Justice Br." refers to the Brief for the Federal

The panel majority of the Fourth Circuit affirmed, holding that while discrimination existed before the enactment of Title VII, the law does not require that a "pre-Act discriminatory difference in salaries [. . . be] affirmatively eliminated." *Bazemore v. Friday*, 751 F.2d 662, 670 (4th Cir. 1984). Similarly, the appeals court affirmed the district court's rejection of the plaintiffs' regression analysis because the figures analyzed "reflect the effect of pre-Act discrimination" and fail to include "variables which ought to be reasonably viewed as determinants of salary." *Id.* at 672. Judge Phillips dissented in part, reasoning that salary differentials continued "until at least 1976," and that the statistical analyses were "wholly consistent" in showing a substantial race-based disparity. *Id.* at 693, 694.

SUMMARY OF ARGUMENT

The Fourth Circuit properly imposed upon the plaintiffs the burden, in their prima facie case, to account for those variables reasonably viewed as determinants of salary. This Court should affirm that standard, and also should require a plaintiff to prove several specific elements, as part of its prima facie case, when attempting to use a multiple regression analysis to show a pattern or practice of disparate treatment.

First, a plaintiff should be required to account for the variables relevant to an employer's salary deter-

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Petitioners. "NAACP Br." refers to the Brief for the Petitioners, NAACP Legal Defense & Educational Fund, Inc. "NCAES Br." refers to the Brief for the Respondents, William C. Friday, *et al.*

mination, a requirement met by initially ensuring that the theoretical foundation of its regression analysis "fits" the particular facts of the case. Thus, a plaintiff's regression analysis should include relevant objective and quantifiable variables that are likely to affect salary determinations. Second, if a variable is truly unquantifiable, the plaintiff should be required at a minimum to substitute a suitable "proxy" for the relevant variable, or account for the variable through other evidence. In addition, a plaintiff should not be excused from the duty to account for a variable merely because it is arguably "tainted," or allegedly masks an employer's discrimination, since the resolution of whether the variable is in fact tainted is a question of fact to be decided by the trial court. Also, a plaintiff's regression normally should focus upon employment decisions made during the relevant time period.

Legal and logical considerations favor adherence to this standard. First, it is consistent with the plaintiff's customary burden in a disparate treatment case to establish an employer's discriminatory intent. Imposition of this burden is particularly important in a pattern or practice case, since a plaintiff under that theory at all times maintains the responsibility for proving by a preponderance of the evidence that race discrimination "was the company's standard operating procedure—the regular rather than the unusual practice." *Teamsters*, 431 U.S. at 336. Finally, such burden is not onerous, but rather merely requires the plaintiff to eliminate the most likely nondiscriminatory reasons for any observed disparity in

order to establish a prima facie case of discrimination.

The Fourth Circuit also applied the proper burden of proof standards in finding that, even if the plaintiffs established their prima facie case, the defendants rebutted it. The appropriate rebuttal standard, as conceded by both plaintiffs herein, requires a defendant *only* to articulate or "raise[] a genuine issue of fact as to whether it discriminated against the plaintiff," not to "persuade the court that it was actually motivated by the proffered reasons." *Texas Department of Community Affairs v. Burdine*, 450 U.S. at 254-55. This rebuttal standard, requiring a defendant only to show that a plaintiff's regression is flawed in its assumptions, data or analysis, is especially important in a case involving a pattern or practice of disparate treatment. Of course, this articulation must be "clear and reasonably specific," and must have some basis in the facts as developed in discovery or otherwise, but a defendant clearly is not required to disprove a plaintiff's case. Finally, as this and other courts have noted, this standard is appropriate since the defendant usually will attempt to show at rebuttal that its practices were lawful, and since liberal discovery rules permit a plaintiff access to the relevant information needed to establish its case.

ARGUMENT

THE COURT OF APPEALS PROPERLY ALLOCATED THE BURDENS OF PROOF IN THIS DISPARATE TREATMENT PATTERN OR PRACTICE CASE INVOLVING THE USE OF A MULTIPLE REGRESSION ANALYSIS

The Fourth Circuit below rejected the plaintiffs' statistical proof because it believed that the plaintiffs failed to establish a prima facie case of intentional discrimination, and found that the defendants would have rebutted any inference of discrimination. In doing so, the court established appropriate burdens of proof for both plaintiffs and defendants in a pattern or practice disparate treatment case where multiple regression analyses are used.[2]

While this case involves the use of a number of complicated statistical analyses, including multiple regression analyses, it is at bottom a relatively simple burden of proof case, in which the parties' respective burdens are defined clearly under previous decisions of this Court. In fact, all parties herein agree that the defendant's burden in such cases is that laid out by this Court in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), and *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977). *See* NAACP Br. at 53; Justice Br. at 25 n.23.

All parties concede, and the courts below properly viewed this case to be a disparate treatment case. Dis-

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[2] EEAC takes no position on whether the plaintiffs in this case established a timely claim under Title VII for current wage disparities that result from pre-Act discrimination. Rather, EEAC's brief is limited to a discussion of the proper burdens of proof in a class action or pattern or practice case involving the use of multiple regression analyses.

parate treatment is concerned with those situations where an employer "simply treats some people less favorably than others *because of* their race, color, religion, sex, or national origin." *Teamsters*, 431 U.S. at 335 n.15 (emphasis added). Proof of discriminatory motive is the central inquiry. *Id.* To establish discriminatory motive in a disparate treatment case, this Court has required a three-part order and allocation of proof. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Briefly, a plaintiff may establish a prima facie case by producing evidence "adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act," *Teamsters*, 431 U.S. at 358, and by "eliminating the most common nondiscriminatory reasons for the employer's actions." *Burdine*, 450 U.S. at 255.[3] A plaintiff carries the burden of showing "actions taken by the employer from which one can infer, if such actions remain unexplained, that it is *more likely than not* that such actions were 'based on a discriminatory criterion illegal under the Act.'" *Furnco*, 438 U.S. at 576, citing *McDonnell Douglas* (emphasis added).

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[3] *McDonnell Douglas* permits the plaintiff to establish a prima facie case by showing "(i) that he belongs to a [protected class]; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." 411 U.S. at 802. The four *McDonnell Douglas* requirements, however, are not an inflexible formula, but "a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978).

The defendant then must "articulate," or come forward with, evidence of "some legitimate, nondiscriminatory reason" for its actions, *McDonnell Douglas*, 411 U.S. at 802, or "provide a nondiscriminatory explanation for the apparently discriminatory result." *Teamsters*, 431 U.S. at 360 n.46. If the defendant carries this burden, the plaintiff has the opportunity to show that the proffered reasons are "pretextual," that they were not the true reasons for the employer's action, and that the true reasons were discriminatory. *McDonnell Douglas*, 411 U.S. at 804-05. The burden of proof remains at all times with the plaintiff. *Burdine*, 450 U.S. 248. As detailed below, these basic principles are fully and readily applicable to pattern or practice cases involving the use of multiple regression analyses.

I. To Establish A Prima Facie Case Of An Employer's Pattern Or Practice Of Disparate Treatment, A Plaintiff's Multiple Regression Analysis Must Account For Variables Reasonably Viewed As Determinants Of Salary

This Court has recognized that "statistics can be an important source of proof in employment discrimination cases." *Hazelwood School District v. United States*, 433 U.S. 299, 307 (1977). In fact, statistics generally, and multiple regressions specifically, often play an important role in proving a pattern or practice of discrimination. This Court has recognized, however, that statistical proof's "usefulness depends on all of the surrounding facts and circumstances." *Teamsters*, 431 U.S. at 340. It is precisely "[b]ecause of the significant role that statistics can play in discrimination cases" and because of their "inherently slippery nature" that "it is imperative that they be used properly." *Wilkins v. University of*

Houston, 654 F.2d 388, 395 (5th Cir.), *vacated and remanded on other grounds*, 459 U.S. 822, *aff'd on remand*, 695 F.2d 134 (5th Cir. 1983); *see also EEOC v. Federal Reserve Bank*, 698 F.2d 633, 645 (4th Cir. 1983), *rev'd and remanded on other grounds sub nom., Cooper v. Federal Reserve Bank*, —— U.S. ——, 104 S.Ct. 2794 (1984).

Multiple regression is a "relatively sophisticated means of determining effects that any number of different factors have upon a particular variable." *Wilkins*, 654 F.2d at 402-03.[4] Thus, the "validity of the [regression] and the significance of its results" must be examined, *id.* at 403, to determine the " 'ex-

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[4] A multiple regression analysis is concerned with the effect that various independent variables (such as race, sex, seniority or education) might have on a dependent variable (such as salary). In other words, a regression analysis, in appropriate cases, can help determine to what extent race may have been a factor in the salary received by certain employees. Thus, the purpose of a regression analysis regarding alleged pay discrimination on the basis of race "is to determine whether a [racial] difference in pay persists when one factors out the possible effects of other variables." D. Bloom and M. Killingsworth, *Pay Discrimination Research and Litigation: The Use of Regression*, 21 Indus. Rel. L.J. 318, 321 (1983). With a multiple regression, "one first specifies the major variables that are believed to influence the dependent [salary] variable." F. Fisher, *Multiple Regression in Legal Proceedings*, 80 Colum. L. Rev. 702, 705 (1980). "The relationship between the dependent variable and the independent variable of interest is then estimated by extracting the effects of the other major variables. . . ." *Id.* at 706. Those results "can be read as showing the effects of each variable on the dependent variable, holding the others constant. Moreover, those results allow one to make statements about the probability that the effect described has merely been observed as a result of chance fluctuation." *Id.*; *see* D. Baldus and J. Cole, *Statistical Proof of Discrimination* § 8.022[1] (1980 & Supp. 1985).

istence of proper supportive facts and the absence of variables which would undermine the reasonableness of the inference of discrimination which is drawn,'" *Federal Reserve Bank*, 698 F.2d at 645, *quoting White v. City of San Diego*, 605 F.2d 455, 460 (9th Cir. 1979). The Fourth Circuit properly stated *generally* that a plaintiff's regression must account for variables reasonably viewed as determinants of salary, but it is imperative to delineate several *specific* elements of that standard which this Court should require for a plaintiff's regression analysis to establish a prima facie case of a pattern or practice of disparate treatment.

A. A Plaintiff Has The Burden To Account For Relevant Variables

1. *The Plaintiff's Regression Must Include The Relevant Objective And Quantifiable Factors Actually Used By The Employer To Make Salary Determinations*

The specific elements of the general standard outlined by the Fourth Circuit flow logically from that standard. First, a plaintiff must relate the theoretical foundation of its regression analysis (in this case, the variables believed to influence salary) to the method *actually used* by the employer to make the decisions under scrutiny. This requirement is often referred to by statisticians as "goodness of fit." *See, e.g., EEOC v. Sears, Roebuck & Co.*, C.A. No. 79C 4373 (E.D. Ill. Jan. 31, 1986), *reprinted in* Daily Labor Report (BNA) D-1, D-6 (Feb. 6, 1986); Baldus and Cole § 8.2; T. Campbell, *Regression Analysis In Title VII Cases: Minimum Standards, Comparable Worth and Other Issues Where Law and Statistics Meet*, 36 Stan. L. Rev. 1299, 1303 (1984); Fisher at 716.

The statistical "model must be hypothesized to link the influences with the outcome," Campbell at 1302, a hypothesis that usually is formed during discovery, and which yields potential explanatory variables that are believed to affect salary. *See Eastland v. Tennessee Valley Authority*, 704 F.2d 613 (11th Cir. 1983), *cert. denied sub nom., James v. Tennessee Valley Authority*, 465 U.S. 1066 (1984); *Stastny v. Southern Bell Tel. & Tel. Co.*, 628 F.2d 267, 274 (4th Cir. 1980); *Penk v. Oregon State Board of Higher Educ.*, C.A. No. 80-436, slip. op at 379-380 (D. Or. Feb. 13, 1985).[5] These variables in the instant case, as recognized by the Fourth Circuit, include education, tenure, job title, work performance and county-by-county disparities. *Bazemore v. Friday*, 751 F.2d 662, 672 (4th Cir. 1984).

The burden to construct a theoretical model that "fits" places the concomitant burden upon a plaintiff to include in its regression those objective and quantifiable variables *relevant* in actually determining wages. *EEOC v. Sears* at D-6 & n.8. Many courts have imposed this relevance requirement, and have examined closely those factors included or omitted from a plaintiff's regression. For example, the court

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[5] The failure to establish a theoretical foundation represents a significant problem for plaintiffs attempting to use a regression analysis to establish a prima facie case. In fact, one commentator in 1984 noted that "in only eight reported cases has the opinion reflected any attempt to measure whether the model was appropriate for the data." Campbell at 1306-07. The commentator also noted that "evidence of the model's appropriateness and the closeness of its fit may have been introduced at trial [in other cases] but not included in the opinion. If so, judges are not exhibiting adequate concern for a fundamental aspect of statistical proof, important upon appellate review." Campbell at 1307 n.22.

in *EEOC v. International Business Machines Corp.*, 583 F. Supp. 875, 906 (D. Md. 1984), found that the plaintiff's omission of relevant factors such as seniority, job level and class groupings rendered the results of its multiple regression analysis "useless." The court in *Tolliver v. Yeargan*, 567 F. Supp. 116 (S.D. Ark. 1983); *aff'd*, 728 F.2d 1076 (8th Cir. 1984), also held that the plaintiff had not established a prima facie case in part because its regression failed to account for school-by-school differences in salary. Another court found that the plaintiff's regression was "rife with methodological and analytical flaws, and therefore is not credible," partly because the analysis failed to account for the defendant's across-the-board percentage increases, as well as discretionary or merit increases. *Coser v. Moore*, 587 F.Supp. 572, 599 (E.D.N.Y. 1983), *aff'd*, 739 F.2d 746 (2d Cir. 1984).[6]

It is clear, therefore, that a plaintiff does not establish its prima facie case when it relies solely upon a regression analysis that does not account for

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[6] *See also EEOC v. Sears* at D-37 (failure to account for, *inter alia*, job performance and the employer's decentralized decision-making made plaintiff's statistics "so flawed that they lack any persuasive value"); *EEOC v. Hartford Fire Insurance Co.*, 31 FEP Cases 531, 545 (D.D.C. 1983) (failure to account for several relevant variables which might have influenced an employee's salary, including age, employment experience, work performance and tenure); *Pouncy v. Prudential Insurance Co.*, 668 F.2d 795, 803 (5th Cir. 1982); *Sobel v. Yeshiva University*, 566 F. Supp. 1166 (S.D.N.Y. 1983) (failure to control for rank); *Eastland*, 704 F.2d at 623 (failure to control for job category casts doubt on regression); *Valentino v. United States*, 511 F. Supp. 917, 945 (D.D.C. 1981), *aff'd* 674 F.2d 56 (D.C. Cir. 1982); *Agarwal v. Arthur G. McKee & Co.*, 19 FEP Cases 503 (N.D. Cal. 1977), *aff'd*, 644 F.2d 803 (9th Cir. 1981).

relevant objective and quantifiable variables. Moreover, to shift the burden of persuasion to the defendant based upon a poorly fitted or incomplete regression would violate the standards of proof articulated by this Court in *Teamsters* and *Burdine*, as discussed *infra*.

2. Where The Plaintiff's Regression Does Not Account For Subjective And Unquantifiable Variables, Evidence Regarding These Relevant Variables Must Be Introduced In Some Other Form To Establish A Prima Facie Case

In some instances, a regression analysis may be unable to account for truly unquantifiable variables, such as job prefereces or motivation. Note, *Title VII, Multiple Linear Regression Models, and the Courts: An Analysis*, 46 Law & Contemp. Probs. 282, 286-7 (1983); *See* M. Finkelstein, *The Judicial Reception of Multiple Regression Studies in Race and Sex Discrimination Cases*, 80 Colum. L. Rev. 737, 742 (1980). It is obvious, however, that employers do, in fact, make employment decisions based upon unquantifiable differences between employees (job performance, in many instances), a practice that is "permissible and necessary under Title VII." *Penk*, slip op. at 387; *see also EEOC v. Sears* at D-38. These unquantifiable variables, in fact, may significantly affect the salaries paid to particular employees. It follows, therefore, that a court cannot correctly hold that plaintiffs have established a prima facie case where their regression fails to account for the actual "processes used . . . to make employment decisions." *Penk*, slip op. at 388; *see EEOC v. Sears* at D-38; *Agarwal*, 19 FEP Cases at 506; *Coser*, 587 F. Supp. at 599.

Plaintiffs, certainly, can use non-statistical evidence to account for the actual processes used by an

employer to make the decisions under scrutiny. In fact, a regression may not be an appropriate means by which to infer discrimination from an employer's compensation scheme, if the factors affecting compensation cannot be quantified. *EEOC v. Sears* at D-39. In the situation where a plaintiff fails to account for the factors affecting compensation, either with a regression or with other evidence, the district judge should dismiss the claim for failure to establish a prima facie case.

Plaintiffs will not be unduly hindered by the imposition of this requirement to account for relevant unquantifiable variables. If a plaintiff wishes to use a regression analysis, instead of other relevant evidence, suitable "proxies" sometimes can be used to estimate variables such as "productivity." [7] The court in *Sobel v. Yeshiva University*, 566 F. Supp. 1166 (S.D.N.Y. 1983), for example, substituted rank as a proxy for productivity. In fact, NCAES in the instant case used the quartile ranking system for productivity, a factor which plaintiffs chose not to incorporate into their regression. Of course, a proxy may not represent a relevant variable exactly. Where an appropriate proxy is not available, it is imperative that a plaintiff prove its case with other evidence.

Plaintiffs often object to any requirement that they account for subjective factors which are alleged to be "tainted," or which allegedly mask an employ-

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[7] A proxy attempts to measure a variable which seems unquantifiable in its pure form. For example, while a regression analysis can account for productivity in a job where the measurement is widgets produced per hour, it may not be able to measure research quality or student teaching in a university setting. *See, e.g., Penk,* slip op. at 385. The proxy purports to measure the apparently unquantifiable factor by substituting another measurement.

er's discrimination. *See James v. Stockham Valves & Fittings Co.*, 559 F.2d 310, 332 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034 (1978); *Greenspan v. Automobile Club of Michigan*, 495 F. Supp. 1021, 1064 (E.D. Mich. 1980); *Melani v. Board of Higher Educ.*, 561 F. Supp. 769, 778 (S.D. N.Y. 1983). This objection lacks persuasive appeal, however, since whether a variable is tainted depends upon the district court's ultimate ruling on whether there has been discrimination in the employer's application of that factor. Absent persuasive extrinsic evidence that the variable was in fact "tainted" by unlawful discrimination, the plaintiffs should be required to include such a variable in their regression analysis. *See EEOC v. Sears* at D-41. Allowing the plaintiffs to exclude the variable from their regression merely because they have *alleged* that the factor was applied discriminatorily would presuppose that discrimination occurred. *See Coates v. Johnson & Johnson*, 756 F.2d 524, 544 (7th Cir. 1985).

Thus, a plaintiff has the specific burden to include in its regression analysis the relevant factors used by the employer to determine salaries. Seemingly subjective or unquantifiable factors may be represented in the analysis by suitable proxies, but where suitable proxies are not available, unquantifiable factors affecting salary must be taken into account by the production of other evidence of discriminatory intent. Plaintiffs also must account for evidence that is arguably tainted unless plaintiffs can prove, with persuasive extrinsic evidence, that the variable actually masks the employer's discrimination. Ultimately, therefore, plaintiffs must account for the factors used

by the employer to make its decisions, or risk failing to establish a prima facie case.[8]

B. The Requirement That A Plaintiff Using A Regression Analysis Account For Relevant Variables As Part Of Its Prima Facie Case Is Consistent With The Legal Requirements And Logical Basis For Establishing A Pattern Or Practice Of Disparate Treatment

Legal and logical reasons favor imposing upon a plaintiff the burden to establish, at the prima facie case stage, that its statistics account for relevant variables that may have affected salary determinations within the relevant time period. This burden is not overly stringent; rather, it is simply a specific application of the plaintiff's normal burden in a disparate treatment case, which is to establish proof of an employer's "discriminatory motive" or intent. *Spaulding v. University of Washington*, 740 F.2d 686 (9th Cir. 1984), *cert. denied*, —— U.S. —— (1984); *Penk*, slip op. at 403.

Adherence to this standard is especially important where a plaintiff alleges a *pattern or practice* of disparate treatment, since under that theory a plaintiff must show by a preponderance of the evidence that the alleged discriminatory practice is the "company's standard operating procedure—the regular rather than the unusual practice." *Cooper*, 104 S. Ct. at 2800, *citing Teamsters* at 336. Such a wholesale

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[8] While EEAC takes no position regarding whether the plaintiffs in the instant case established a timely claim under Title VII for current wage disparities resulting from pre-Act discrimination, it is important to stress that regression analyses normally should focus on employment decisions made during the relevant time period. *See Valentino*, 511 F. Supp. at 944, 955; *see generally Hazelwood*, 433 U.S. at 309; *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977).

attack on an employer's standard operating procedure "must be one based upon a specific intent to discriminate against an entire group, to treat it as a group less favorably because of [race]." *EEOC v. International Business Machines Corp.*, 583 F. Supp. at 903, *citing Stastny*, 628 F.2d at 274 n.10. A plaintiff alleging disparate treatment, of course, always bears the prima facie burden to "eliminate[] the most common nondiscriminatory reasons for the employer's action." *Burdine*, 450 U.S. at 254. But where the attack is directed at an employer's entire operating procedure, it is particularly important that the plaintiff's evidence account for variables that might legitimately explain differences in measured results.

This standard has intuitive appeal given the ultimate factual issue before the district court in a case of this type: whether the defendant both *intentionally* and as a *standard operating procedure*, discriminated against the plaintiffs. Thus, it makes little sense to permit a plaintiff to establish its initial burden with statistics that fail to account for the primary factors that are likely to affect salary.

Requiring a plaintiff to account for such factors is entirely reasonable. The Justice Department, a plaintiff herein, has noted that the Fourth Circuit "clearly would have erred if it had held, as private petitioners assert in their Questions Presented, 'that statistics may not be treated as probative evidence of discrimination unless the statistical analysis considers every conceivable non-racial variable.' " Justice Br. at 21. Of course, the court below did not impose this onerous "every conceivable variable" burden on plaintiffs. Rather, as the Justice Department itself acknowledges, "the appellate court articulated

the correct rule, that a plaintiff's statistical analyses in a disparate treatment case must include 'variables which ought to be reasonably viewed as determinants of salary.'" *Id.* This burden is one which properly allocates the relative burdens between plaintiffs and defendants and, with the further requirement that a plaintiff account, either through its regression analysis or otherwise, for relevant variables, will provide adequate guidance to future litigants.

II. A Defendant Need Only Articulate A Nondiscriminatory Reason For Its Conduct By Identifying A Relevant Variable Omitted From Plaintiff's Regression, And Need Not Disprove Plaintiff's Case At Rebuttal

The Fourth Circuit below rejected the plaintiffs' regression analysis because the court determined that plaintiffs failed to establish a prima facie case. *Bazemore*, 751 F.2d at 672. The court went on to find that even "assum[ing] that a prima facie case was made . . . it has been completely refuted [by NCAES]." *Id.* at 687. It is important for the present discussion to examine what the law currently requires a defendant to produce to rebut a plaintiff's prima facie case, and how that theoretical burden should be applied in a regression case.

Once a plaintiff establishes an inference of intentional discrimination by proving a prima facie case, the burden shifts to the employer to "articulate some legitimate, nondiscriminatory reason" for the challenged action, *McDonnell Douglas*, 411 U.S. at 802, or to "provide a nondiscriminatory explanation for the apparently discriminatory result." *Teamsters*, 434 U.S. at 360 n.46; *Burdine*, 450 U.S. at 255. This *Burdine* standard, conceded as applicable by NAACP in its brief at 53 and by the Justice Department in its brief at 25 n.23, requires that the defendant "clearly

set forth, through the introduction of admissible evidence, the reasons for [its actions]." *Burdine*, 450 U.S. at 255. This concession by the petitioners is important, because defendant's burden is then merely to "raise[] a genuine issue of fact as to whether it discriminated against the plaintiff," *not* to "persuade the court that it was actually motivated by the proffered reasons." *Id.* at 254-55.

Thus, the *Burdine* standard, as applied to a pattern or practice case involving regression analyses, permits a defendant to meet its burden *either* (1) by showing that a plaintiff's regression is flawed in its assumptions, data or analysis; *or* (2) by demonstrating, through its own analysis, that there does not exist a significant statistical disparity. *Teamsters*, 431 U.S. at [illegible] 9-40; See B. Schlei and P. Grossman, *Employment Discrimination Law* (BNA) 1323 (2d ed. 1983).

The defendant's articulation, of course, must be "clear and reasonably specific." *Burdine*, 450 U.S. at 258. Typically, this burden of specific articulation in a regression case will be met when the defendant identifies a relevant variable that is likely to have affected salary, which is omitted from the plaintiff's regression or otherwise is unaccounted for in the plaintiff's evidence. This identification of an omitted variable will "raise[] a genuine issue of fact as to whether [the defendant] discriminated against the plaintiff," *id.* at 254-55, and will also provide the plaintiff with a full and fair opportunity to demonstrate pretext at the next stage of proof. *Id.* at 258; *see Sweeney v. Research Foundation*, 711 F.2d 1179 (2d Cir. 1983); *Grano v. Department of Develop-*

ment, 699 F.2d 836, 837 (6th Cir. 1983); *White v. Vathally*, 732 F.2d 1037 (1st Cir.), 469 U.S. ——, *cert. denied*, 105 S.Ct. 331 (1984); *See also* Schlei and Grossman (Supp. 1983-84) at 250.

The two alternative methods of rebutting a plaintiff's case—identifying an omitted variable or presenting a more appropriate regression—will not result in a "nonexistent" level of proof as plaintiffs fear. Under the first method, a defendant's articulation of an omitted variable will raise more than theoretical or hypothetical objections to a plaintiff's regression. *Trout v. Lehman*, 702 F.2d 1094, 1102 (D.C. Cir. 1983), *vacated and remanded on other grounds*, 465 U.S. 1056 (1984); *Penk*, slip op. at 404. Normally, this articulation will be grounded in the facts as determined during discovery. Alternatively, if a defendant chooses to present a more appropriate regression, its model normally will focus the issues by demonstrating that the inclusion of different or additional variables may affect the outcome.

Under no circumstances, however, should the defendant be required at rebuttal to "rework plaintiff's statistics" by "incorporating the omitted factor," or to demonstrate "how specific errors" actually have affected the statistical results obtained from the plaintiff's model, as some courts have required. *See, e.g., Trout*, 702 F.2d at 1102; *Capaci v. Katz & Besthoff, Inc.*, 711 F.2d 647, 654 (5th Cir. 1983), *cert. denied*, 466 U.S. 927 (1984); *Segar v. Civiletti*, 508 F. Supp. 690, 712 (D.D.C. 1981), *rev'd in part sub nom., Segar v. Smith*, 738 F.2d 1249 (D.C. Cir.), *cert. denied sub nom., Meese v. Segar*, 105 S.Ct. 2357 (1985). As noted by the Justice Department, these

cases rely on *Teamsters* for the relevant burden standards. Justice Br. at 25 n.23. "But the pattern of proof in *Teamsters* does not differ significantly from that stated in *Burdine*," a standard which should only require a showing of "inaccurate or insignificant" proof or providing a "nondiscriminatory explanation," not the more burdensome standard of persuasion. *Id.* Thus, while the employer always has the option of offering its own regression analysis to offset the plaintiff's prima facie showing, it is not required to do so.

Other policy reasons stated by this Court favor imposing the traditional *Burdine* rebuttal standard upon a defendant in a pattern or practice disparate treatment case. As this Court stated in *Burdine*, a limited evidentiary obligation will not "unduly hinder the plaintiff." 450 U.S. at 258. At the "pretext" stage, the plaintiff will have the opportunity to show that the defendant's stated reason has no basis in fact, and that its real reason was a discriminatory one, which, if proven, ends the inquiry.

This Court has noted a final reason why a plaintiff will not be disadvantaged by a defendant's limited evidentiary obligation at the rebuttal stage. "[L]iberal discovery rules applicable to any civil suit in federal court" allow the plaintiff to become aware, at an early stage, of the relevant facts making up the employer's decision. *Id; see also Penk*, slip op. at 398. This rationale is especially appropriate in the instant case, where the extensive discovery prior to the plaintiff's development of its statistical regression should have alerted it to the fact that NCAES would claim that across-the-board increases, county-

by-county disparities, and merit differentials would account for significant wage disparities.[9]

The *Burdine* and *Teamsters* rebuttal standard, therefore, requires the defendant to identify clearly and specifically a relevant variable omitted from a plaintiff's regression, or otherwise not accounted for by the plaintiff's evidence. This identification properly focuses the inquiry, yet reinforces plaintiff's ultimate burden of proving, either with a regression analysis or with other evidence, that the employer engaged in a pattern or practice of intentional discrimination.

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[9] The Justice Department argues that it "should be excused from including" the county-by-county variable in its regression even though it is a "major salary-affecting variable," because this factor was not revealed "until the brink of trial." Justice Br. at 30 & n.30. NCAES responds that depositions conducted before 1975, and again in July 1981 revealed this factor as important. *See* NCAES Br. Regardless of whether plaintiffs were *actually* notified, the argument of the Justice Department may well be legally irrelevant, since lack of actual notice does not obviate a plaintiff's responsibility to account for a relevant factor that it should have been aware of through discovery. *See* discussion, *supra*, at 8-17.

CONCLUSION

For the foregoing reasons, EEAC respectfully urges this Court to clarify the respective burdens of proof that rest upon plaintiffs and defendants in cases involving the use of multiple regression analyses, as set forth herein.

Respectfully submitted,

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